

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEONARD OWENS,	§	
	§	No. 742, 2009
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0812018979
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: June 16, 2010

Decided: July 29, 2010

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 29<sup>th</sup> day of July, 2010, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Leonard Owens, the defendant-below, appeals from his Superior Court conviction of Possession of a Deadly Weapon by a Person Prohibited. Owens contends that the trial court committed plain error by instructing the jury that a State's witness was "hostile." We find no merit to Owens' claim and affirm.

2. On December 27, 2008, Owens asked John Thompson, and Thompson agreed, to drive Owens to Bruce Jones' home. When they arrived, Thompson remained in the car while Owens exited and knocked on Jones' door. Jones opened the door and a verbal altercation ensued. Jones retreated inside his house

and called the police, reporting to them that Owens was outside his house and possibly armed. Jones' next door neighbor, Randall Pinkston, witnessed the altercation. While Jones was inside his house calling 911, Owens placed a black bag that he was carrying into Thompson's car.

3. After the police arrived at the scene, Pinkston told them that Owens had put a black bag in Thompson's car. After searching Thompson's car, the police discovered the black bag, which contained a loaded .40 caliber semi-automatic firearm. Thompson denied ownership of that firearm.

4. Following a jury trial in July 2009, the jury failed to reach a verdict, and the trial judge declared a mistrial. The State retried Owens in September 2009. During the second trial, the State requested a sidebar during its direct examination of Bruce Jones. The State asked for the trial judge's permission to ask leading questions, because the State considered Jones to be a hostile witness.<sup>1</sup> The trial

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<sup>1</sup> Jones' testimony leading up to the sidebar was less than forthcoming. For example, the following exchange occurred:

Q: And what was the argument about?

A: I don't know. I don't know, man, what he was arguing about.

Q: So he was upset?

A: Yeah.

Q: Earlier that day had you seen your sister?

A: Yeah.

Q: And why did you see her that day? What were you doing?

A: She called me to help her move some stuff out of her house.

Q: What stuff was that?

A: Some furniture and stuff like that.

Q: And why did she ask you to help move it out?

A: I don't know. She just told me to come help her move the stuff out.

judge granted the State permission to treat the witness as hostile. Defense counsel then requested that the trial judge issue a curative instruction to the jury. The trial judge gave the following instruction:

The Court: Ladies and gentlemen, the Court has determined that Mr. Jones is a hostile witness; and, therefore, I am going to allow the State to proceed by way of leading questions.

5. In addition to the testimony of Bruce Jones, the State elicited testimony from Randall Pinkston, that Owens was carrying a black bag at the time of the altercation and that Owens had put the black bag into Thompson's car before the police arrived. The State also played a recording of Bruce Jones' 911 telephone call. After the one-day trial, Owens was convicted of Possession of a Deadly Weapon by a Person Prohibited. The trial judge sentenced Owens to eight years in prison, followed by six months probation.

6. Owens contends that the Superior Court violated Article IV, Section 19 of the Delaware Constitution by instructing the jury that a witness was hostile. Because Owens did not object to that instruction, his claim is waived unless he can

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Q: Was it the defendant's property?

A: I think so.

Q: And is that why he was at your house at 9:30 that night?

A: I guess. I don't know.

Jones further testified that he had a lack of interest in testifying because he considered Owens his brother.

show plain error.<sup>2</sup> “To obtain a reversal based upon the plain error standard of appellate review, the appellant has the burden of demonstrating that the error complained of is so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”<sup>3</sup>

7. Plain error generally assumes oversight.<sup>4</sup> Here, Owens’ claim of plain error is not related to oversight, because defense counsel specifically requested the instruction at issue.<sup>5</sup> Nevertheless, “[w]here there is plain error, the fact that the error may have been ‘invited’ by the actions of defense counsel does not render it less significant or result in a forfeiture of the appellate review.”<sup>6</sup> But, because defense counsel made a tactical decision to request the curative instruction at issue, this type of claim is more appropriately raised in a motion for post-conviction relief claiming ineffective assistance of counsel. In any event, we find that Owens’ claim is without merit because the trial judge did not err in giving the instruction that defense counsel requested.

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<sup>2</sup> Del. Supr. Ct. R. 8 (“Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.”); *Trump v. State*, 753 A.2d 963 (Del. 2000).

<sup>3</sup> *Flamer v. State*, 953 A.2d 130, 133 (Del. 2008).

<sup>4</sup> *Johnson v. State*, 983 A.2d 904, 923 (Del. 2009); *Keyser v. State*, 893 A.2d 956, 961 (Del. 2006).

<sup>5</sup> *Tucker v. State*, 564 A.2d 1110, 1118 (Del. 1989) (stating that oversight is “error ‘affecting substantial rights ... not brought to the attention of the court.’”).

<sup>6</sup> *Wainwright v. State*, 504 A.2d 1096, 1101 (Del. 1986).

8. In Delaware, a judge presiding over a jury trial “shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law.”<sup>7</sup> The drafters of Article IV, Section 19 of the Delaware Constitution enacted the provision “to protect the province of the jury on factual issues.”<sup>8</sup> “An improper comment or charge as to ‘matters of fact’ is an expression by the court, directly or indirectly, that conveys to the jury the court’s estimation of the truth, falsity or weight of testimony in relation to the matter at issue.”<sup>9</sup>

9. The trial judge’s instruction to the jury—that witness Jones was hostile—was not an expression of the court’s opinion regarding the veracity or weight of that witness’ testimony.<sup>10</sup> A hostile witness is simply one who is adverse to the party examining that witness,<sup>11</sup> and whose designation as “hostile” permits the examiner to ask leading questions of that witness.<sup>12</sup> Even the most generous interpretation of the judge’s instruction would simply have informed the jury that Jones was not testifying favorably to the State’s case. A declaration that a witness

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<sup>7</sup> DEL. CONST. art. IV, § 19.

<sup>8</sup> *Lunnon v. State*, 710 A.2d 197, 201 (Del. 1998).

<sup>9</sup> *Herring v. State*, 805 A.2d 872, 876 (Del. 2002) (citation omitted).

<sup>10</sup> *Id.*

<sup>11</sup> DEL. R. EVID. 611(c).

<sup>12</sup> *Id.*

is hostile does not touch upon the veracity or weight of his or her testimony. All it signifies is that its content is contrary to the examining party's position.

10. Even assuming, *arguendo*, that the instruction was given in error, it did not rise to the level of plain error. Given the strength of the State's case, and the limited use of Bruce Jones' testimony, the jury instruction declaring Jones a hostile witness, did not so clearly prejudice Owens' substantial rights as to jeopardize the fairness and integrity of the trial process.<sup>13</sup>

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs  
Justice

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<sup>13</sup> *Flamer*, 953 A.2d at 133 (citing *Morgan*, 922 A.2d at 402).